

OCT 4 1989

JOSEPH F. SPANIOLO, JR.  
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No. 89-298

In The  
**Supreme Court of the United States**  
October Term, 1989

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CHARLES DOWNING AND PAUL VENERONI,  
*Petitioners,*  
v.

CITY OF URBANA, EX REL. NEWLIN,  
DIRECTOR OF LAW,  
*Respondent.*

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**BRIEF OPPOSING PETITION  
FOR WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT**

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## STATUTORY AUTHORITIES

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Ohio Revised Code:	
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## STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is essentially correct, but several points require emphasis or comment.

This case was filed as a declaratory judgment under Section 133.014 of The Code of Ordinances of the City of Urbana ("U.C.C." herein) to have the trial court declare whether or not the magazines in question are obscene within the purview of U.C.C. Section 133.01 (E). Petitioners were not charged with any criminal or civil violations and the only relief requested and granted was the resolution of that question.

Also, the sections of the Urbana City Code of Ordinances on obscenity mirror in all material respects the relevant obscenity statutes of the State of Ohio, i.e., Sections 2907.01, 2907.32 and 2907.36 of the Ohio Revised Code. And in keeping with the decision in *State v. Burgin*, 56 Ohio St.2d 354 (1978) which authoritatively applied the standards set forth in *Miller v. California*, 413 U.S. 15 (1973) to these Ohio statutes, the trial court applied the *Miller* standards to the Urbana City Code sections "... in determining the question of obscenity. . . ." Petitioners' Appendix at 65a. The Ohio Supreme Court, on appeal, approved this procedure as it had previously done in *Burgin*.

In comment it may be noted that Petitioners make certain characterizations of the magazines and certain interpretations of what the Ohio Supreme Court held. Suffice it to say at this point that the magazines and decision of the Ohio Supreme Court speak for themselves and these editorial statements are not accepted as accurate.

Otherwise, no issue is taken with Petitioners' Statement of the Case.

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### REASONS FOR DENYING WRIT

**A. THE CITY OF URBANA'S OBSCENITY ORDINANCE DOES NOT VIOLATE THE RULE THAT ONLY MATERIAL THAT DEPICTS OR DESCRIBES HARDCORE SEXUAL CONDUCT CAN BE FOUND TO BE OBSCENE.**

The decision of the Ohio Supreme Court does not support the construction of the Urbana City obscenity law for which Petitioners argue in their proposition "I". On the contrary, the decision requires that "sexual conduct" of the "hardcore" nature must always be proved as an element of the prosecution's case.

In the case of *Turoso v. The Cleveland Municipal Court*, 674 F.2d 486 (6th Cir. 1982), cert. den. 459 U.S. 880 (1982), wherein the Sixth Circuit analyzed and discussed the interplay of the Ohio State obscenity statute and the incorporation of the requirements of *Miller v. California*, 413 U.S. 15 (1973), that Court was presented with the same argument that Petitioners make here. See 674 F.2d at 492. That Court disposed of the argument as "superficial" and went on to point out that under the Ohio State statute it is always necessary for the prosecution to prove, along with other requirements, that,

- (a) The material depicts conduct which is sexual; that it depicts vaginal intercourse or any of the other explicit examples expressly set forth in the definition of sexual conduct in Section 2907.01 (A), or one of the two examples of such conduct as described in *Miller*. 674 F.2d at 493.

In this case, the Ohio Supreme Court specifically stated,

The same incorporation analysis which was followed in *Burgin* and approved in *Turoso* for RC 2907.01 (F) applies with equal force to the current Urbana Ordinance, U.C.C. Section 133.01 (E). Petition Appendix at 13a.

Additionally, it approved the proposition that "hardcore sexual conduct" is the standard (Petition Appendix at 12a) and went on to find that,

All five magazines contain either in text, photographs, or their advertisements, numerous depictions or descriptions of ultimate sexual act, cunnilingus, fellatio and sodomy. They, therefore, contain "sexual conduct" as defined by U.C.C. Section 133.01 (A) [R.C. 2907.01 (A)]. Petition Appendix at 18a.

The Supreme Court further noted that the above-mentioned depictions found in the magazines are generally considered "hardcore" activity. See Footnote 8, Petition Appendix at 19a.

Therefore, the question Petitioners pose is not a real issue here because of the prior decision of the Sixth Circuit in the *Turoso* case and the approval of its analysis by the Ohio Supreme Court in this case.

Furthermore, even if the abstract question presented can be sustained by Petitioners, the reality of this case is that the magazines at issue contain depictions of "sexual conduct" of a "hardcore" nature consistent with the requirements of the Urbana Code and the requirements of *Miller*. Consequently, Petitioners have in no way been prejudiced or affected by the asserted possible construction of the Urbana obscenity law for which they argue.

**B. THE MAGAZINES IN QUESTION CONTAIN A SIGNIFICANT NUMBER OF PHOTOGRAPHS OF SEXUAL CONDUCT.**

In their proposition "II", Petitioners argue that a quantitative analysis of the descriptions or depictions of sexual conduct is necessary to satisfy that requirement of *Miller* and conclude that those shown in the magazines in question do not rise to the level of materiality.

Petitioners do not cite any authority for this argument nor do they indicate what the required number must be under any given circumstances. They merely conclude that "... small, isolated photographs in advertisements. . . ." are not sufficient. See Petition at 14-15.

Petitioners clearly understate the sexual conduct exhibited in these magazines as is demonstrated by the summary of the photographic and pictorial depictions of sexual conduct which appears as the Appendix to this brief. As demonstrated, the numbers are significant, they appear throughout the magazines and most are not "small, isolated photographs in advertisements."

It, therefore, is evident that the trier of fact, having found all the other elements necessary to find the magazines obscene, could reasonably have concluded that the element of sexual conduct was satisfied.

**C. THE URBANA CITY OBSCENITY LAW IS CONSTITUTIONAL AS AUTHORITATIVELY CONSTRUED TO INCORPORATE THE GUIDELINES OF *MILLER*.**

Section 2907.01 (F), Ohio Revised Code, has been authoritatively construed to incorporate the *Miller* test for



obscenity. *State v. Burgin*, 56 Ohio St. 2d 354, Syllabus 1 (1978). The Sixth Circuit Court of Appeals has, therefore, found the Ohio Statute constitutional and this Court has refused to review that decision. *Sovereign News Co. v. Falke*, 674 F.2d 484 (6th Cir. 1982), cert. den. sub nom *Warner v. Sovereign News Co.* 459 U.S. 864 (1982) and *Sovereign News Co. v. Corrigan*, 459 U.S. 883 (1982) and *Turoso v. Cleveland Municipal Court*, *supra*.

The Ohio Supreme court has held in this case that the same incorporation analysis applies to the Urbana obscenity law which is in all material respects the same as the Ohio State statute. See Petition Appendix at 13a. An eminently reasonable conclusion.

Petitioners argue in their proposition "III", however, that the foregoing is inapplicable in this case because the Ohio Supreme Court has approved a definition of sexual conduct which is at odds with the *Miller* standards and the above cases. This is not true, as demonstrated in A. above.

Petitioners next attack the Urbana obscenity law on the basis that since it post-dates *Miller* but does not include the *Miller* standards specifically, it is constitutionally deficient. No authority is cited for this proposition.

Certainly there are other reasons why Petitioners' argument is without substance, but the ultimate question is how have Petitioners been prejudiced by the legislative procedure followed by Respondent? It is submitted that there has been no prejudice since the case was tried and reviewed on the basis of an extensive body of State and Federal case law incorporating the *Miller* standards in existence since 1978 beginning with the *Burgin* decision.



Petitioners, when they sold the magazines in question on November 25, 1985, must be deemed to have been on notice and fully advised of the State law, as interpreted and applied, governing obscenity. It would thus certainly seem that they have been afforded notice, fairness and due process when the same body of law is applied to the Urbana obscenity law.

Also, this Court made it clear in *Miller* that it would look at a challenged law from the standpoint of *either how it is written or how it is construed* to determine if the First Amendment values are protected. See 413 U.S. at 25. And it subsequently amplified that position by clearly indicating in *Ward v. Illinois*, 431 U.S. 767 (1976) that it is not for this Court to tell legislatures how they must legislate, but rather its job is to weigh the result, as construed, against the requirements of *Miller*.

Petitioners' argument for better crafted obscenity law is, therefore, without merit.

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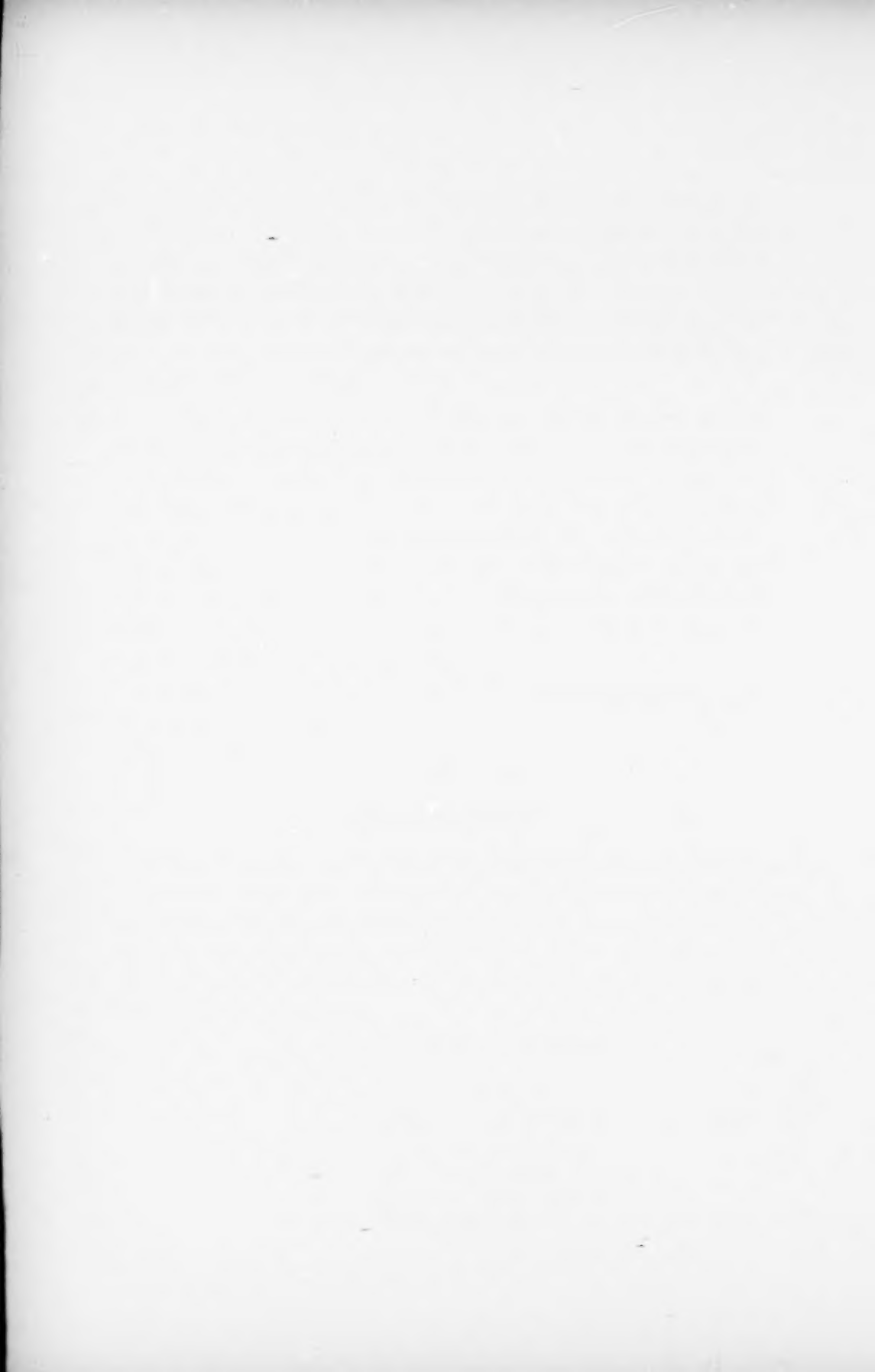
### CONCLUSION

The Petition for a writ of certiorari should not be granted as Petitioners' arguments are either immaterial, demonstrating no practical prejudice in this case, or they have been previously rejected by a body of State and Federal law in existence for a number of years prior to the filing of this case.

Respectfully submitted,

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## APPENDIX



SUMMARY OF SEXUAL CONDUCT

<u>Magazine</u>	<u>Plaintiff's Exhibit To Complaint</u>	<u>Cunnilingus (Pages)</u>	<u>Fellatio (Pages)</u>	<u>Intercourse (Pages)</u>	<u>Masturbation (Page)</u>	<u>Sodomy (Pages)</u>
<u>Nugget</u>	#1	9, 33, 34, 40, 41, 42, 87	28, 40, 41, 42, 78, 85			33, 41, 85, 87
<u>Velvet</u>	#2	1, 9, 18, 32, 34-35, 39, 43, 50, 60, 65, 80, 83, 87	1, 10, 17, 32, 50, 66, 81, 82, 83, 87, 88	10, 17, 33, 37, 38, 59, 60, 69, 82	38	59, 82 and 83
<u>Juggs</u>	#3	← Last Ten Pages (unnumbered) →				
<u>Oui</u>	#4	6, 95, 97, 106	82, 92, 95, 97, 106, 109	42, 92, 95, 97, 106, 109		40, 95, 97, 106, 109
<u>Big Boobs</u>	#5	1, 44, 45, 46-47, 67, 68-69	48	45, 48		